No. 14,983

United States Court of Appeals

for the Ninth Circuit

THEODORE B. RUSSELL,

Appellant,

vs

THE TEXAS COMPANY, a corporation, FREDERICK T. MANNING DRILLING COMPANY, a corporation, and

THE NORTHERN PACIFIC RAILWAY COMPANY, a corporation,

Appellees.

THE TEXAS COMPANY, a corporation,

Appellant,

vs

THEODORE B. RUSSELL,

Appellee.

Brief of Appellant

Appeal from the United States District Court for the District of Montana

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RALPH J. ANDERSON,

STANLEY P. SORENSON,

Attorneys for Appellant, Theodore B. Russell

THURBER'S HELENA

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LAWS AND STATUTES

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PRELIMINARY MATTERS

1. JURISDICTION OF THE LOWER COURT AND OF THIS COURT

In compliance with the rules of this Court the appellant, Theodore B. Russell, presents the following statement showing the basis of the jurisdiction of the lower court and the basis of the jurisdiction of this Court to entertain this appeal.

This action was brought by the appellant, Theodore B. Russell, in the District Court of the United States for the District of Montana, Billings Division, wherein the action was Civil Action No. 1448. The lower court, having original jurisdiction of this cause by virtue of Section 1332, 28 U. S. C. A., which reads as follows:

> "(a). The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:
>
> "(1). Citizens of different States;
>
> (2). Citizens of a State, and foreign states or citizens or subjects thereof;
>
> (3). Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.
>
> "(b). The word 'States' as used in this section includes the Territories and the District of Columbia. June 25, 1948, c. 646, 62 Stat. 930."

The action was brought for the purpose of having a purported mineral reservation of the Northern Pacific Railway Company on certain lands located in Montana adjudged void, for the purpose of having certain oil leases purportedly granted under the said reservation adjudged void and that the cloud created by the purported mineral reservation and the purported oil and gas lease be removed. In a second and third cause of action the plaintiff seeks judgment against the Texas Company for damages on account of the use by that company of his land, both in connection with drilling

operations thereon and in connection with the Texas Company's operations on adjoining lands. As to the first cause of action, it is alleged in paragraph 2 of the Complaint (R. 3-4) that the amount in controversy is more than the sum of $3,000 exclusive of interest and costs. This allegation is admitted by defendant, The Texas Company (R. 17) and by defendant, Northern Pacific Railway Company (R. 37). The same allegation is made by the plaintiff with reference to the second cause of action (R. 10) and the third cause of action (R.12). The prayer of the Complaint seeks to have declared void and invalid the mineral reservation upon lands which are producing substantial quantities of oil. See plaintiff's exhibit No. 10, a certified copy of the records of the Oil and Gas Conservation Commission of the State of Montana. The prayer also seeks damages in the amount of $100,000.00 and in the amount of $150.00 per day from the 30th day of October, 1952, to and including the 2nd day of December, 1952 (R. 15-16). Unquestionably, the matter in controversy is in excess of the jurisdictional amount. See the following cases:

Gray v. Blight, C.C.A. Colo. 1940, 112 F. (2d) 696, certiorari denied 61 S. Ct. 170, 311 U.S. 704, 85 L. Ed. 457;

Wyoming Rep. Co. v. Herrington, C.C.A. Wyo. 1947, 163 F. (2d) 1004.

The plaintiff, Russell, in paragraph No. 1 of his Complaint (R. 3) alleges that he is a cititzen and resident of the State of Iowa, that the defendant, The Texas Company, is a corporation created, organized and existing under and by

virtue of the laws of the State of Delaware, and that the defendant, Northern Pacific Railway Companay, is a corporation created, organized and existing under and by virtue of the laws of the State of Wisconsin. These allegations are admitted by the defendant, The Texas Company (R. 12) and by the defendant, Northern Pacific Railway Company, (R. 37). The same allegations as to the citizenship and residence of the plaintiff and as to the state of incorporation of the defendant, The Texas Company, are found in the second and third causes of action (R. 10, 12) and are admitted by the defendant, The Texas Companay (R. 33, 34). The defendant, Frederick T. Manning Drilling Company, is no longer in the case, the action having been dismissed as to this defendant, by stipulation of the parties (R. 109,110). It is, therefore, apparent that the requisite diversity of citienship exists.

Defendant, Northern Pacific Railway Companay filed a motion for summary judgment (R. 54). The defendant, The Texas Companay, filed a motion for partial judgment (R. 52). These motions resulted in an order for partial summary judgment made and entered November 23, 1953 (R. 66) and partial summary judgment pursuant thereto, also entered December 3, 1953 (R. 69). An appeal was taken by the plaintiff, Theodore Russell, from the partial summary judgment, which appeal, No. 14,246, was dismissed by this Court as premature under Rule 54-B of the Federal Rules of Civil Procedure. See Russell v. The Texas Company et al, 211 F. (2d) 740. Subsequently, a trial was had on the 20th day of April, 1955 (R. 171) resulting in a final judgment

(R. 126) incorporating the previous partial summary judgment. Plaintiff's appeal from the partial summary judgment, entered on the 3rd day of December, 1953, and from the final judgment, excepting only that portion thereof by which it is ordered, adjudged and decreed that the defendant, The Texas Company, pay to the plaintiff the sum of $3,600.00 under a contract between the plaintiff and the defendant.

This Court's jurisdiction to hear and determine this appeal is based upon Section 1291, 28 U.S.C.A., which provides as follows:

> "The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929."

Notice of appeal was filed within time (R. 132). The requisite bond on appeal has been filed (R. 133) and the appeal has since been prosecuted with diligence.

2. STATEMENT OF THE CASE

The land involved in this action is Section 23, Township 17 North, Range 53 East, M.P.M., Dawson County, Montana.

This section was originally acquired by the defendant, Northern Pacific Railway Company under an Act of Con-

gress, approved July 2, 1864, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound, on the Pacific Coast, by the northern route," 13 Stat. at L. 365, Chap, 217, which was an act providing for the incorporation of the Northern Pacific Railroad Company, predecessor of the defendant Railway Company. By the terms of that Act, the pertinent portions of which are set forth in the appendix to this brief, no mortgage or construction bonds were to be issued, or any mortgage lien created on the grant except with the consent of Congress. By a Joint Resolution of Congress, approved May 31, 1870, 16 Stat. at L. 378, Congress authorized the Northern Pacific Railroad Company to issue bonds to aid in the construction and equipment of its road, said bonds to be secured by mortgages on all of its property, railroad, land grants, and franchise to be a corporation. The Joint Resolution granted further lands and contained a proviso to the effect that the granted lands, not sold or disposed of by the Railroad Companay or subject to the mortgage authorized by the Joint Resolution, at the expiration of five years after the completion of the entire road, should be subject to settlement and preemption like other lands, at a price to be paid to the Railroad not exceeding Two Dollars and Fifty Cents ($2.50) per acre. The Railroad Company took advantage of the provisions of the Joint Resolution and mortgaged the lands and selection rights granted by the Joint Resolution and by the Act of July 2, 1864. The Railroad Company defaulted in the payments to be made upon the bonds secured by the mortgages in a foreclosure action the

lands and rights of the Railroad Company were sold to the defendant Railway Company and the defendant Railway Company succeeded to all of the rights, privileges and obligations of the Railroad Company, under the Act of 1864 and the Joint Resolution of 1870.

In the year 1900, defendant, Railway Company made a selection of public lands enuring to it under the terms and provisions of the Act of Congress of 1864 and the Joint Resolution of 1870. The lands with which this action is concerned were included within that selection and were patented to the Railway Compaany in June of 1902. On the 30th day of November, 1909, the Railway Company contracted to sell the lands to one MaBelle Cobb for a consideration of Four Dollars and Fifty Cents ($4.50) per acre. A certified copy of this contract is before this Court. The date of the contract was more than five years after the completion of the entire road of the Northern Pacific Railroad Company and its successor, the Northern Pacific Railway Company, and the lands had not been previously sold or disposed of by the Northern Pacific Railway Company and were not subject to the mortgage authorized by the Joint Resolution of 1870. Through various assignments one Millard Strubrud succeeded to the interest of MaBelle Cobb and in 1918 the Railway Company conveyed the land by warranty deed to Millard Strubrud. The plaintiff, Theodore Russell, is the successor in interest of Millard Strubrud.

The deed from the Railway Company to Strubrud contained an exception and reservation of all minerals of any

nature, including coal, iron, natural gas and oil, together with the use of so much of the surface as might be necessary for exploring for and mining or otherwise extracting and carrying away the minerals, with the obligation upon the grantor, its successors and assigns, to pay to the grantee, his heirs or assigns, the market value of such portions of the surface as may be used for such operations. This deed appears in the Transcript of Record on Page 59.

An Abstract of Title to the land was introduced in evidence and the original has been, by order of the court below, transmitted to this Court (R. 136). It should be noted that the above mentioned reservation does not appear at any point in the Abstract.

The defendant, The Texas Company, is the Lessee under an oil and gas lease from the defendant Railway Company, embracing these lands, and since on or about the late spring of the year 1952 the Texas Companay has conducted extensive operations on the section involved and has used in connection with its operations on the section involved, 25.76 acres. (R. 114). The defendant, The Texas Company, has also made use of the surface of this section in connection with its operations upon other lands, which use the defendant admits was wrongful (R. 33, 35).

The foregoing facts are undisputed. The issues presented by this appeal are as follows:

(1) Did the proviso of the Joint Resolution of Congress of 1870, relative to settlement and preemption, apply to the land here involved?

(2) If so, is the reservation of mineral rights by the defendant Railway Company valid?

The foregoing issues concern both the defendant Railway Company and the defendant, The Texas Company. There are also certain issues which are raised by the second and third causes of action, which involve only the defendant, The Texas Company. These are:

(1) The recovery to which the plaintiff is entitled by reason of the wrongful use by The Texas Company of the surface of Section 23, in connection with its operations upon other lands.

(2) The amount of compensation to which the plaintiff is entitled by reason of the use of the surface of Section 23.

The lower court found the reservation valid (R. 113, 66, 69, 126); found the plaintiff entitled to the sum of $3,600 by reason of the wrongful use of the surface of Section 23, in connection with operations upon other lands under a revocable license, at the rate of $150.00 per day for such use (R. 119) and found the plaintiff entitled to recover $10.00 an acre for the lands in Section 23, used by the defendant, The Texas Company, a total of Two Hundred Thirty-seven Dollars and Sixty Cents ($237.60) (R. 114, 119). The court further found and concluded that the evidence was insufficient for the court to determine the damages resulting to the plaintiff for the wrongful use of Section 23, during the period not covered by the revocable license (R. 119).

SPECIFICATIONS OF ERROR

(1) The Court erred as a matter of law in ordering, in its Order entered November 23, 1953, that summary judgment be entered in favor of the defendant, Northern Pacific Railway Company (R. 66).

(2) The Court erred as a matter of law in ordering, in its Order of November 23, 1953, that at all times referred to in the pleadings, the defendants, The Texas Company and Frederick T. Manning Drilling Company, were and now are authorized and entitled to enter upon the lands described in the Complaint, as Lessees of the defendant, Northern Pacific Railway Company, and to the use of such of the surface of said lands as was or is necessary for exploring for and mining, or otherwise extracting or carrying away, all minerals of any nature whatsoever, including coal, iron, natural gas, and oil, upon or in said lands, and that plaintiff is not entitled to an injunction or order restraining defendants from such use. (R. 67).

(3) The Court erred as a matter of law in ordering, in its Order entered November 23, 1953, that the only issue of fact between the plaintiff and the defendants, The Texas Company and Frederick T. Manning Drilling Company, is the compensation to which the plaintiff is entitled for its use of plaintiff's land (R. 68).

(4) The Court erred in entering its Summary Judgment in favor of the defendant, Northern Pacific Railway Company. (R. 69).

(5) The Court erred in its Findings of Fact, filed October 6, 1955, in arriving at its Findings of Fact No. III, as follows, to-wit:

> "Defendant Northern Pacific Railway Company, as successor in interest to the Northern Pacific Railroad Company, acquired fee title to Section 23 under the land grant act of July 2, 1864, C 217, 13. Stat. 365." (R. 112).

The said Findings being contrary to the evidence and against the law.

(6) The Court erred in arriving at its Findings of Fact No. IV, as follows, to-wit:

> "On June 14, 1918, defendant Northern Pacific Railway Company as grantor conveyed Section 23 to the predecessors in interest of the plaintiff, the conveyance containing the following mineral exception and reservation:
>
> " 'Excepting and reserving to the grantor, its successors and assigns, forever, all minerals of any nature whatsoever, including coal, iron, natural gas and oil, upon or in said lands, together with the use of such surface as may be necessary for exploring for and mining or otherwise extracting and carrying away the same but the grantor, its successors and assigns, shall pay to the grantee, or his heirs or assigns, the market value at the time mining operations are commenced of such portion of the surface as may be used for such operations, including any improvements thereon; * * *'
>
> "At all times since, the defendant Northern Pacific Railway Company has been, and now is, the owner in fee of all minerals upon, in or under Section 23, to-

gether with the right to use such of the surface as may be necessary for the purpose of exloring for, or mining or extracting said minerals; obligated, however, to pay to the owner of the remainder of the surface rights the market value as of the time any mining operations commenced of such portion of the surface taken for such mining purpose." (R. 112, 113).

The said Findings being contrary to the evidence and against the law.

(7) The Court erred in arriving at its Findings of Fact No. V, as follows, to-wit:

"That at all times since June 14, 1944, plaintiff Theodore B. Russell has been, and now is the owner of all surface rights in Section 23 other than those excepted and reserved by the defendant Northern Pacific Railway Company." (R. 113).

The said Findings being contrary to the evidence and against the law.

(8) The Court erred in arriving at its Findings of Fact No. IX, as follows, to-wit:

"That the most valuable use available to the plaintiff for Section 23 as of March 14, 1952, was the use for grazing purposes." (R. 114).

The said Findings being contrary to the evidence and against the law.

(9) The Court erred in arriving at its Findings of Fact No. X, as follows, to-wit:

"That the market value of Section 23 to the plaintiff March 14, 1952, was $10.00 per acre. The rental value of the section was $100.00 per year. (R. 114).

The said Finding being contrary to the evidence and against the law.

(10) The Court erred in arriving at its Findings of Fact No. XVI, as follows, to-wit:

"That all of the rock used by defendant from plaintiff's lands, both in connection with its operations thereon and in connection with its operations on adjacent lands, was taken from the 23.76 acres of plaintiff's land referred to in Finding No. XI of these Findings of Fact, for which the plaintiff will be compensated by the payment to him of the market value of said 23.76 acres at the time defendant commenced its operations on his said lands, as provided in said mineral reservation; that there was not sufficient competent evidence from which the Court can find the reasonable market value of the use of the roads across plaintiff's lands in connection with defendant's operations on adjacent lands for the period in which said roads were so used not covered by the revocable license referred in in Finding No. XIV of these Findings of Fact; with regard to water from plaintiff's lands used by defendant on adjoining lands, there is no evidence from which the Court can determine the amount of such water which was so used during the period of the revocable license referred to in Finding No. XIV, and the amounts of such water so used during the period not covered by said license; and with regard to all the water used by defendant, both on and off of plaintiff's land, there is not sufficient evidence from which the Court can determine the reasonable market value of said water." (R. 117).

The said Finding being contrary to the evidence and against the law.

(11) The Court erred in arriving at its Conclusion of Law No. II, as follows, to-wit:

> "That the Northern Pacific Railway Company is the owner in fee of all minerals upon, in or under Section 23, Township 17 North, Range 53 East, M.P.M., Dawson County, Montana, together with the use of such of the surface as may be necessary for exploring, for and mining or otherwise extracting and carrying away the same." (R. 118).

The said Conclusion being contrary to the law.

(12) The Court erred in arriving at its Conclusion of Law No. III, as follows, to-wit:

> "That plaintiff Theodore B. Russell is the owner of the surface of said land subject to the rights reserved to the Northern Pacific Railway Company." (R. 118).

The said Conclusion being contrary to the law.

(13) The Court erred in arriving at its Conclusion of Law No. IV, as follows, to-wit:

> "That the defendant The Texas Company was lawfully authorized on March 14, 1952, to enter upon Section 23, as lessee of the Northern Pacific Railway Company and at all times since has been and now is authorized to use such of the surface of Section 23 as is nec essary to conduct mining operations thereon, obligated, however, to pay to plaintiff Theodore B. Russell the market value as of March 14, 1952, of such of the surface of Section 23 as it has taken for such mining op-

erations, or may in the future take for such mining operations. That as of the date of this trial the defendant The Texas Company owes plaintiff Theodore B. Russell the sum of $237.60, being the reasonable market value as of March 14, 1952, the date upon which the surface of Section 23, used by said defendant in connection with its mining operations on said Section." (R. 118, 119).

The said Conclusion being contrary to the evidence and the law.

(14) The Court erred in arriving at its Conclusion of Law No. VI, as follows, to-wit:

"That for the wrongful use of said Section 23 and the rock and water therefrom, during the period not covered by said revocable license agreement heretofore referred to, the evidence is insufficient for the Court to find the reasonable value of such use." (R. 119, 120).

The said Conclusion being contrary to the evidence and the law.

(15) The Court erred in arriving at its Conclusion of Law No. VII, as follows, to-wit:

"That plaintiff is entitled to judgment in the total sum of $3,837.60, together with his costs." (R. 120).

The said Conclusion being contrary to the evidence and the law.

(16) The Court erred in arriving at its Conclusion of Law No. VIII, as follows, to-wit:

"That plaintiff is not entitled to an injunction against defendant." (R. 120).

The said Conclusion being contrary to the evidence and the law.

(17) The Court erred in ordering the entry of judgment, based upon the said Findings of Fact and Conclusions of Law. (R. 120).

(18) The Court erred in ordering, adjudging and decreeing in its judgment entered October 13, 1955, that Summary Judgment be entered in favor of the defendant, Northern Pacific Railway Company and against the plaintiff with costs. That the defendant, Northern Pacific Railway Company has been and now is the owner in fee of all minerals upon, in or under Section 23, Township 17 North, Range 53 East, M.P.M., Dawson County, Montana, together with the right to use such of the surface of said lands as may be necessary for the purpose of exploring for or mining or extracting certain minerals. (R. 127, 128).

(19) The Court erred in adjudging and decreeing in its Judgment and Decree, entered the 13th day of October, 1955, that the defendant, The Texas Company, at all of the times mentioned in the pleadings, had and now has the right to enter upon the land described in the Complaint, as Lessee of the defendant Northern Pacific Railway Company, and to the use of such of the surface of certain lands as was or is necessary for exploring for and mining or otherwise extracting and carrying away all minerals of any nature whatsoever, including coal, iron, natural gas and oil, upon or in said lands and that the plaintiff is not entitled to an injunction against either the defendant Northern Pacific Railway Company or the defendant The Texas Company. (R. 128).

(20) The Court erred in adjudging and decreeing in its Judgment and Decree entered October 13, 1955, that the defendant The Texas Company pay to the plaintiff the sum of $237.60, for the reasonable market value of that portion of said lands used by the defendant, The Texas Company, in its mining operations. (R. 128).

(21) The Court erred in failing to adopt as its Findings of Fact and Conclusions of Law the plaintiff's proposed Findings of Fact and Conclusions of Law. (R. 95-102).

ARGUMENT

I. *The Summary Judgment in Favor of the Defendant Nothern Pacific Railway Company and Partial Summary Judgment in Favor of the Defendant The Texas Company.*

(a) *Procedure and Power of the Court and Burden Relative to Motions for Summary Judgments.*

At the outset we present the following authorities illustrating the proper procedure, the power of the court and the burden upon the movant in considering the motion for Summary Judgment:

> Fairbanks, Morse & Co. v. Consolidated Fiseries Co., 190 F. (2d) 817, 824
>
> "The law is clear that one who moves for a summary judgment has the burden of demonstrating that there is no genuine issue of fact."
>
> Landy v. Silverman, 189 Fed (2d) 80, 82
>
> "That one reasonably may surmise that the plaintiff is unlikely to prevail upon a trial, is not a sufficient basis for refusing him his day in court with respect to

issues which are not shown to be sham, frivolous, or so unsubstantial that it would obviously be futile to try them." Quoting from Sprague v. Vogt, 8 Cir. 150 F. (2d) 795, 801

Ford v. Luria Steel & Trading Corp., 192 F. (2d) 880, 882

"It has become settled law that a genuine issue as to a material fact cannot be tried and determined upon affidavits, and that it must conclusively be shown that there is no such issue in the case and that the moving party is entitled to judgment as a matter of law, before summary judgment can lawfully be entered."

Snyder v. Dravo Corporation, 6 F.R.D. 546, 549

"All doubts as to the existence of a genuine or substantial issue as to a material fact must be resolved against the party moving for summary judgment, and the existence of a genuine or substantial dispute as to a material fact forecloses or bars summary judgment."

Thomas v. Martin, 8 F.R.D. 638

"If there be a substantial issue raised by the pleadings as distinguished from formal issues raised thereby, a motion for summary judgment cannot be sustained even though affidavits be submitted in denial of the substantial issues. The point to be determined on such motion is whether there is a real issue existing and in doing this all doubts are resolved against the movant."

St. Louis Fire & Marine Ins. Co. v. Witney, 96 F. Sup. 555 holds that all doubts must be resolved against movant.

United States v. Haynes School Dist. No. 8, 102 F. Supp. 843, 848

"Before a motion for summary judgment may be properly granted, it must clearly appear that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. Federal Rules of Civil Procedure, Rule 56 (c). The moving party has the burden of showing the absence of such an issue, and any reasonable doubt in that connection must be resolved in favor of the party resisting the motion, and facts asserted by such party must be taken as true."

(b) *Validity of the Mineral Reservation and the Leases Granted Thereunder*

The appellant's position in this aspect of the case may be outlined or summarized as follows:

1. The Granting Act of 1864, Chap. 217, 13 Stat. L., 365, the pertinent portions of which are set forth at pages 52 through 56 in the appendix to this Brief, provided for a grant to the Northern Pacific Railroad Company, predecessor of the defendant Railway Company, of every odd-numbered section in a belt ten (10) miles wide on each side of the right-of-way through states, and twenty (20) miles wide on each side of the right-of-way through territories. The lands contained in these belts were known as place lands. The Act also provided for another belt ten (10) miles in width on each side of the place land belt, from which the Railroad Company might select odd-numbered sections to replace sections lost to the place land grant by reason of prior preemption, mineral character, etc. These lands were known as the indemnity lands. The land involved

in this case is place land. The Granting Act of 1864 was a grant in praesenti, but the Railroad Company did not acquire title to the land by the Granting Act alone, and the Granting Act did not provide for the acquisition by the Railroad Company of a complete title. One of the incidents of an absolute fee—the power to mortgage, was withheld.

2. The Joint Resolution of 1870, Resolution 67,16 Stat. at L., 378, the pertinent portions of which are set forth at pages 56 through 58 in the appendix to this Brief, made a further grant to the Railroad Company, provided for yet another indemnity belt and provided for a new and increased title to the place lands of the 1864 Grant by removing the limitation upon the fee to be required by the Railroad Companay contained in the Grant of 1864. The Railroad Company took advantage of the Resolution of 1870 by mortgaging the lands and selection rights received by and under the Grant of 1864.

3. By accepting the Joint Resolution of 1870, as it applied to the lands granted by the Act of 1864, the Railroad Company created a contract between itself and the United States for the benefit of third parties, by which it bound itself to dispose of the granted lands as provided in the Resolution of 1870.

4. The Granting Acts were and are laws as well as contracts and the purported mineral reservation of the defendant Railway Company is against the law, as well as being contrary to the contract.

5. The Railroad Company, by accepting the Resolution of 1870, bound itself to sell the lands without reservation and that which ought to have been done is to be regarded as done in favor of him to whom and against him from whom performanace is due.

6. The defendant Railway Company, acquiring the interests of the Railroad Company upon foreclosure of the mortgages made pursuant to the Joint Resolution of 1870, succeeded to the obligations as well as to the privileges of the Railroad Company and upon selection by the defendant Railway Companay of the land here involved, it received title to that land subject to the same conditions as were applicable to the Railroad Company.

7. The reservations being illegal are void and the contract and deed by which the Railway Company parted with title to the land here in question, have the same effect as if there had been no such reservation contained therein. Consequently, the mineral interests passed to the plaintiff's predecessors by virtue of the contract and deed.

There is a further question raised by the manner in which the mortgage placed upon the lands and rights of the Railroad Company was foreclosed. This question will be considered separately.

1. *Nature and Effective Date of the Original Grant of July 2, 1864*

As stated in the outline above set forth, the Grant under the Act of July 2, 1864, 13 Stat. L. 365, was what is commonly referred to in the cases as a "grant in praesenti." The

grant was a grant in praesenti, but it was a conditional and limited grant. The grant vested title in the Railroad Company, but on the condition that the Railroad Company perform certain obligations, as provided in the Granting Act. In St. Paul & Pacific R. Co. v. N. P. R. Co., 11 S. Ct. 389, 139 U. S. 1, 35 L. Ed., 77, the Supreme Court of the United States in discussing the nature of the title acquired by the Railroad Company, said:

> "Although the restraint in the Act against the sale or alienation of the lands when once identified are not the subject of consideration in the present case, it may be well, to obviate misapprehension, to observe that the Companay, notwithstanding its possession of the title, was not at liberty to dispose of the lands without the consent of Congress, except as each 25-mile section was completed and accepted by the President, so as to deprive the United States of the right to compel their application to the purposes of the grant, or so as to prevent their forfeiture in case of the Company's failure to comply with its conditions."

The condition concerning which the Supreme Court was speaking, is relatively unimportant in this action, but it serves to illustrate the nature of the title acquired by the Railroad Company.

The Act did not of itself invest the Railroad Company with title to any specific land. In other words, the lands were not conveyed by the Act alone. In St. Paul & Pacific R. C. v. N. P. R. Co., Supra, 11 S. Ct. 389, 139 U.S. 1,

35 L. Ed. 77, the Supreme Court, at another point in the opinion, had this to say:

> "The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but, when once identified, the title attached to them as of the date of the grant, except as to such sections as are specifically reserved. It is in this sense that the grant is termed one in praesenti; * * *."

The limitation upon the grant of which we spoke above, and which is of importance in this action, was the restraint placed upon the company's right of alienation by the provisions forbidding the mortgaging or creation of a lien contained in the Granting Act of 1864. (See Appendix page 56). This restraint was clear and explicit and it constituted a clear limitation upon the title granted, the power to mortgage being, of course, an incident of an absolute fee the grant, lacking this incident of an absolute fee, was clearly a limited grant.

2. *The Joint Resolution of 1870 Constituted a Grant of New Title to the "Place Lands" in Montana*

We have demonstrated that the grant of 1864 was a limited grant. The title which the Railroad Company could acquire under that grant was limited, for it could not mortgage, or in any way create a lien upon the land granted by the Act. The Joint Resolution of 1870 then gave the Railroad Company permission to mortgage.

(See page 56 of the appendix). It was in effect a re-grant of the same land, for it enlarged the Railroad Company's title to the land and granted to it a title to the land granted by the Act of 1864, which it had not theretofore enjoyed. This re-grant or new grant, as to the 1864 land, could have been accepted or rejected by the Railroad Company merely by mortgaging or not mortgaging the land. The Railroad Company accepted the new title granted and mortgaged the land, but Congress placed a condition upon this new grant, and that condition was the proviso regarding preemption and settlement. In the Resolution they granted new land and in addition they said—You may have a better title to the land already granted, but if you take advantage of this grant then "all lands hereby granted * * * which shall not be sold or disposed of or remain subject to the mortgage by this Act authorized, at the expiration of five (5) years after the completion of the entire road, shall be subject to settlement and preemption, like other lands, at a price to be paid to said company, not exceeding $2.50 per acre." (See page ___ of appendix). Having taken advantage of the Resolution and having accepted the more complete title offered, the Railroad Company was obligated to accept this burden as well. They must take the bitter with the sweet.

That the Northern Pacific Railway Company, when it succeeded to the rights of the Railroad Company, succeeded also to its burdens is settled. The Railway Company itself apparently recognized that fact. In its Place List No. 36, which was submitted to the District Court in opposition to the Motion for Summary Judgment, and which is before this Court, hav-

ing by order of the lower court been transmitted to this Court in the form introduced in the lower court (R. 136), the defendant Railway Company recited:

> "NORTHERN PACIFIC RAILWAY COMPANY, the successors of the NORTHERN PACIFIC RAILROAD COMPANY under and by virtue of the Acts of Congress entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route,' approved July 2, 1864, and 'A Resolution authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road and to secure the same by mortgage, and for other purposes,' approved May 31, 1870, and under and in pursuance of the Rules and Regulations prescribed by the Commissioner of the General Land Office, hereby makes and files the following list of selections of public lands claimed by the said Northern Pacific Railway Company, as enuring to it, and to which it is entitled under and by virtue of the grants and provisions of the said Act of Congress, * * *."

The Northern Pacific Railway Company and the Land Office apparently believed the Railway Company to be the successor of the Railroad Company to the rights granted and the obligations imposed by the Act of 1864 and the Resolution of 1870, and clearly they were correct in so considering. The Railway Company became the owner and operator of the railroad. It became entitled to and exercised the rights of the Railroad Company under the Act and the Resolution and it assumed the obligations of the Railroad Company.

The Supreme Court of the United States likewise has rec-

ognized that the Railway Company is bound by the obligations imposed upon the Railroad Company in the Act of 1864 and the Resolution of 1870. In United States v. Northern Pacific Railway Company, 61 S. Ct. 264, 311 U.S. 317, 84 L. Ed. 210, the court said:

> "A majority of the Justices who heard this case are of the opinion that the proviso of the Resolution of 1870 required the company to open the lands granted by the Resolution to preemption and settlement at the expiration of five years from the completion of the entire line in 1887, whether the lands were then subject to the mortgage or not; that its failure so to do was a breach of its contract with the United States and that the Government is entitled, if it can, to prove any damage to it or advantage to the company, which resulted from this breach of contract."

Five years after the completion of the railroad was 1902, the mortgage foreclosure and sale thereunder to the defendant, Railway Company, took place immediately thereafter in 1903.

The Congress of the United States also apparently agrees with the proposition that the Railway Company succeeded to the rights of the Railroad Company and to its obligations, for in the Act enacted in 1929 providing for the bringing of the action resulting in the opinion last above cited, it said:

> "* * * and the passage of this Chapter shall not be construed as in anywise evidencing the purpose or intention of Congress to depart from the policy of the United States expressed in the resolution of May 31,

> 1870, relative to the disposition of granted lands by said grantee, and the right is hereby reserved to the United States to, at any time, enact further legislation relating thereto." 43 U.S.C.A. 923

On the basis of the foregoing arguments and authorities, we submit that the proviso of the Joint Resolution of 1870 applies to the lands acquired by the Railway Company under the Grant of 1864.

3. *By Virtue of the Proviso of the Joint Resolution of 1870, the Purported Mineral Reservation of the Northern Pacific Railway Company Is Void.*

That the proviso of the Joint Resolution created a contract between the company and the United States, enforceable by the parties to be benefited, namely, those desiring to purchase lands granted to the company, can be demonstrated by comparison with the grant considered in the case of Ore. & Cal. R.R. v. U.S., 238, U.S. 393, 35 S. Ct. 908, 59 L. Ed. 1360. The proviso in the Granting Act there involved, read as follows:

> "That the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding Two Dollars and Fifty Cents per acre;"

In that case the United States Supreme Court held that the above quoted proviso was not a mandate to sell, but a limitation on the power to sell. The Court said:

> "There could not be an absolute right to settle or purchase unless there was an absolute compulsion to sell."

The Supreme Court was clearly correct as to the proviso involved in the case last above cited. The words "to actual settlers only" are words of limitation not of direction. The proviso in this case on the other hand, required that the lands be opened to settlement and preemption, which requirement was recognized by the Supreme Court of the United States in U.S. v. N.P.Ry. Co., Supra, 311 U.S., 317. See in particular the quotation from that case, set forth supra, at page 26. How can it be said that the lands are open to settlement and preemption if the company could refuse to sell to a person seeking to purchase under that proviso? Clearly the proviso in the Resolution of 1870 was a mandate to sell, provided, of course, that there should be a purchaser. This being the case, there was created a contract for the benefit of a class of third persons, and under the majority Amercian rule, such a contract can be enforced by a third person who is a member of the class to be benefited. 12 Am. Jur. Contracts, Sections 277, 287, Pages 825, 840. This proviso is made with the clear intent and purpose to benefit the persons purchasing from the Railway Company. The country benefits only as the people are benefited, and it is clearly the purchaser who receives or should have received the benefit of the proviso.

Actually, enforcement of the contract is involved only incidentally. The Railroad Company, when it mortgaged the property, accepted the Joint Resolution and the proviso

therein contained, and agreed to sell the land as therein provided. The defendant Railway Company succeeded to this obligation as well as to the rights of the Railroad Company. Plaintiff now seeks the equitable remedy of the removal of the cloud cast upon his title by the purported mineral reservation. By virtue of the proviso, the conveyance from the Railway Company to the Plaintiff's predecessor, should have included the minerals. The maxim "that which ought to have been done is to be regarded as done, in favor of him to whom, and against him from whom, performance is due" (Section 49-121, Revised Codes of Montana, 1947) operates upon this transaction and the conveyance should be considered as including the minerals, even though it contains a purported reservation, for the defendant Railway Company, bound itself to convey the minerals with the land. See Krutzfeld v. Stevenson, et al, 86 Mont. 463, 284 Pac., 553, wherein it was held that where a vendor executed a deed to an interest in oil lands and received an adequate consideration therefor, he could not come into a court of equity to evade his obligation on the ground that the deed did not convey what he had agreed to convey, but the court would consider as done that which should have been done and sustain the transaction. In this case the defendant Railway Company cannot escape its obligation upon the ground that the deed does not convey what it had bound itself to convey by the acceptance of the Joint Resolution of 1870.

The defendant Railway Company may argue that even under the proviso it had the power to reserve the minerals. That contention was answered in Ore. & C.R. Co. v. U.S.,

243 U.S. 549, 61 L. Ed. 890, wherein the Supreme Court said:

> "An immediate and sufficient answer to the contention would seem to be that the grant was not absolute, but was qualified by a condition in favor of settlers, and if the 'lands' granted had such incidents, the 'lands' directed to be sold to actual settlers were intended to have such incidents. That is, if the 'lands' granted carried by necessary implication all that was above the surface and all below the surface, to the Railroad Company, they carried such implication to the actual settler. In other words, what 'lands' meant to the Railroad Company they meant to the settler, embraced within his right to purchase and acquire." 243 U.S. 552, 553.

Under the above authority, it clear that when the Railway Company sold the land it was required by the proviso to sell it without reservation.

The Railway Company may advance arguments based upon estoppel, laches or Statutes of Limitations, being their arguments under the doctrines of estoppel, upon the fact that the plaintiff herein traces his title to the original grantee from the Railroad Company. In Ore. & C. R. Co. v. U.S., Supra, 238 U.S. 393, we find the following statement:

> "We may observe that the Acts of Congress are laws as well as grants, and have the constancy of laws as well as their command and are operative and obligatory until repealed. This comment applies to and answers all the other contentions of the Railroad Company based on waiver, acquiescence and estoppel and even to the defenses of laches and the Statute of Limitations."

The above quotation also demonstrates that the reservation in this case is not only void as against the contract, but that it was void at its inception as against the law. In Lowery v. Garfield County, 122 Mont. 571, 208 Pac. (2d) 478, the Supreme Court of Montana said:

> "A void thing is no thing; it has no legal effect whatsoever and no right can be obtained under it or grow out of it."

If the reservation was void at its inception, as against the contract and against the law, is it any less void now? We submit that it is not.

(c) *The Mortgage Foreclosure Proceedings*

The Joint Resolution of 1870 provided certain specific steps by which the mortgage authorized by the Joint Resolution was to be foreclosed, if the occasion for foreclosure arose. It provided in part as follows:

> "* * * and if the mortgage hereby authorized shall, at any time be enforced by the foreclosure or other legal proceeding, or the mortgaged lands hereby granted, or any of them, be sold by the trustee to whom such mortgage may be executed, either at its maturity or for any failure or default of said company, under the terms hereof, such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder."

The fact that not one acre of land was sold at the foreclosure sale to any purchaser other than the defendant Rail-

way Company, is strong indication that the provisions of the Joint Resolution set forth above were not observed. Aside from that fact, the Special Master's report of the sale, filed in the office of the United States Circuit Court at Helena, Montana, on August 1, 1896, a copy of which is before this Court, reveals conclusively that the provisions of the Resolution were not complied with. It reveals that lands located in North Dakota were sold in Montana in violation of the provisions that they should be sold in the state where they were situated. It reveals that the lands and rights of the Railroad Company were sold in bulk to the Railway Company in violation of the provision that the land should be sold in single sections or subdivisions thereof. Here we might also point out a strange fact was revealed by the Special Master's report, that the Northern Pacific Railway Company was somehow enabled to purchase all these lands and rights for the insignificant sum of $500,000, a very small fraction of their true value.

In 37 Am. Jur., Mortgages, Sec. 786, p. 191, we find the following statement:

> "As a general rule, if one who purchases property under an invalid mortgage foreclosure sale takes possession of the mortgaged property with the acquiescence of the mortgagor, he becomes a mortgagee in possession, entitled to the rights and chargeable with the liabilities, of a person in that capacity."

And in 37 Am. Jur., Mortgages, Sec. 804, p. 200, it is said:

> "As a rule, a purchaser at an invalid mortgage foreclosure sale stands in the position of a mortgagee and

may prosecute another foreclosure proceeding, or, if the sale is thereafter set aside, he may have the original mortgage foreclosed on his behalf."

Under the void foreclosure sale the defendant Railway Company became, in effect, an assignee of the mortgagee, entitled to its rights and chargeable with its duties. It could enforce a foreclosure of the mortgage and sell the property but it could not reserve the minerals for there was no such right in the mortgagee. The sale of one section to Stubrud must, therefore, have been pursuant to this power and for that reason the purported reservation of minerals, which the Railway Company had no right to make, must be void and the minerals passed with the conveyance of the surface.

Upon reason and authority it is respectfully submitted that the Complaint in this action states a cause of action and that the defendants were not entitled to the Summary Judgments which were granted. The author is confident that This Honorable Court will not readily perpetuate the pernicious monopoly created by the defendant Railway Company's consistent refusel to abide by the provisions of laws passed for the protection of the public and the greater good of the country.

II. *Judgment on the Second and Third Causes of Action*

In connection with the Judgment of the court, on the second and third causes of action contained in the plaintiff's Complaint, the contentions of the plaintiff may be summarized as follows:

(1) The court adopted an incorrect valuation for the lands taken by The Texas Company, in connection with its operations upon Section 23.

(2) That the court was incorrect in determining that there was not sufficient evidence from which the court could determine the recovery to which plaintiff was entitled by reason of the wrongful use of Section 23, and the rock and water therefrom in connection with defendant, The Texas Company's operations upon other lands, during the period not covered by the Revocable License. The damages to which plaintiff would be entitled if the reservation is void, being a matter of fact, which, by reason of the Summary Judgments, was not explored, we will not consider that aspect of the case.

(a) *Admittedly Wrongful Use of Plaintiff's Property and Revocable License to Continue Such Use.*

In the Complaint it is alleged, in the third cause of action therein, that the defendant The Texas Company, constructed and used road ways across the lands of the plaintiff herein, as a means of access to other lands; that the defendant The Texas Company, removed water from the lands of the plaintiff for use upon other lands; and that the defendant The Texas Company, has taken rock from the lands of the plaintiff, which rock was used in the construction of the roads for access to other lands. (R. 13-15). It is further alleged that these actions were wrongful and a trespass upon the lands of the plaintiff. It is alleged that on or about the 30th day of October, 1952, the plaintiff demanded of the de-

fendant The Texas Company, that it cease its use of the lands of the plaintiff in connection with its operations upon other lands, and that at the same time plaintiff offered to the defendant The Texas Company, a Revocable License to continue such use for a consideration of $150.00 per day, to be paid to the plaintiff, and informed the defendant that the continued use would be taken as an acceptance of the offer. It is alleged on information and belief, that the defendant The Texas Company, continued to use the road ways, water and rock, to and including the 2nd day of December, 1952, and in its answer (R. 34-36), the defendant The Texas Company, admits that the road ways were used as a means of access to other lands; admits that rock from the plaintiff's lands was used in the construction of roads for adjacent lands; and admits that the use of said roads, water and rock for use upon adjacent lands was wrongful. Defendant The Texas Company also admits the demand and offer previously referred to. Plaintiff herein does not appeal from that portion of the Judgment by which the lower court found the existence of the Revocable License and awarded to the plaintiff the sum of $3,600.00 thereunder, but defendant The Texas Company, cross-appeals from that portion of the Judgment. (R. 129). Consequently, we shall present some discussion of the matter of the Revocable License.

By its admissions of December 11, 1953 (Plaintiff's Exhibit 5) defendant The Texas Company, admitted receipt by Frederick T. Manning Drilling Company of the original, and by defendant The Texas Company, a copy of the letter

of October 28, a copy of which letter is attached to the admissions, and in which letter we find the following offer:

> "Mr. Theodore B. Russell is willing to permit you a Revocable License to continue the use to the extent that the same has existed over the past period upon your payment to him of the sum of $150.00 per day for each day that such use continues, the said sum to be payable daily. Your continued use of the road way, water and/or materials will constitute your acceptance of this revocable permit."

The use referred to is set forth in the first paragraph of the letter as follows:

> "Mr. Theodore B. Russell has called our attention to the fact that in your operations on Sections 22 and 29, Township 17 North, Range 53 East, Dawson County, Montana, you are using road ways across his Section 23, Township 17 North, Range 53 East, Dawson County. He advises further, that in your operations on Section 22 you are diverting water from his Section 23. Further, in your operations on Section 22, you are utilizing materials taken from Mr. Russell's Section 23."

By letter dated November 3, 1952, receipt of which was also admitted, the reference to Section 29 in the letter of October 28, is corrected to read Section 26 and compliance with the letter of October 28th is again requested. By its answer, dated April 13, 1955 (Plaintiff's Exhibit 9) to interrogatories submitted to them by the plaintiff, The Texas Company admits that it used the road ways on the plaintiff's Section 23 for access to other lands until and including the 22nd day of November, 1952. By its admission of De-

cember 11, 1953 (Plaintiff's Exhibit 5) The Texas Company admits that no answer was made to the letter of October 28, 1952 until after December 8, 1952. The Texas Company admits that it responded for the first time under date of December 16, 1952. The Texas Company also admitted by its admissions dated the 28th day of February, 1955 (Plaintiff's Exhibit 7) that the letter from The Texas Company, in answer to the letter of October 28, 1952, was postmarked December 26, 1952. From these answers to interrogatories and admissions and from the pleadings, it is clear that The Texas Company continued its use of the plaintiff's lands in connection with its operations upon other lands, after the letter of October 28, 1952, received by it on October 30, 1952, until the 22nd day of November, 1952. It is our contention, with which the lower court agreed, that The Texas Company thereby became indebted to the plaintiff in the sum of $150.00 per daya for each day of such use. By mathematical computation, this amounts to $3,600.00, the amount awarded by the court.

In support of our contention and in support of the court's findings, we direct this Court's attention to Section 13-320, Revised Codes of Montana, 1947, which provides as follows:

> "Performance of the condition of a proposal, or the acceptance of a consideration offered with a proposal, is an acceptance of the proposal."

There can be no question concerning the acceptance by The Texas Company of the consideration offered by the plaintiff in connection with his offer of Revocable License.

As we have pointed out, The Texas Company admitted the continued use of the road ways until November 22, 1952. Furthermore, The Texas Company, by its answer of December 11, 1953, to interrogatories submitted to them by the plaintiff (Plaintiff's Exhibit 3) admitted the use of 15,000 barrels of water from plaintiff's Section 23 for use in drilling on Section 22, between September 14, 1952, and November 12, 1952. By virtue of Section 13-320, Revised Codes of Montana, 1947, above quoted, this continued use after the letter of October 28, was an acceptance of the proposal contained in that letter. Furthermore, it was such an acceptance as was contemplated by that letter. See Steinbrenner v. Minot Auto Company, 56 Mont. 27, 35, 180 Pac. 729, wherein the Supreme Court of Montana said:

> "It is also settled law that the party making the offer may prescribe the mode by which acceptance shall be made, if at all."

Plaintiff made the offer of the Revocable License to The Texas Companay, that a continued use would be deemed an acceptance. The Texas Company admits that the use was without right. They further admit that they continued the use, thus accepting the consideration offered with the proposal. We fail to see how there can be any serious question as to the right of the plaintiff to recover from these defendants, at the rate of $150.00 per day, upon this aspect of the case. See also Section 13-325, Revised Codes of Montana, 1947, which provides as follows:

> "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations

arising from it. So far as the facts are known or ought to be known, to the person accepting."

In the face of the letter of October 28, 1952, The Texas Company could not continue its use of the plaintiff's lands in connection with its operations upon other lands without incurring the attendant obligations. We submit that the appeal of The Texas Company from that portion of the Judgment, awarding to the plaintiff the sum of $3,600.00 as compensation under the Revocable License, is clearly without merit.

Concerning the use by the defendant, The Texas Company, of the plaintiff's lands in connection with their operations upon other lands, prior to the letter of October 28, 1952, the question is, of course, one of damages, and the court found the evidence insufficient to determine the amount of such damages, which findings we have specified as error. By its answers to the interrogatories, dated April 13, 1955 (Plaintiff's Exhibit 9) defendant The Texas Company, admitted the commencement of this use on September 3, 1952. By its answers of December 11, 1953 (Plaintiff's Exhibit 3) defendant The Texas Company, admitted that between September 14, 1952 and November 12, 1952, they used 15,000 barrels of water from the plaintiff's Section 23, in drilling on Section 22. They likewise admitted the use of 50 cubic yards of scoria in connection with their operations upon Section 22. It seemed clear that the damages to which the plaintiff was and is entitled on this aspect of the case, would be the value of the use and of the materials and water taken.

As we shall hereinafter demonstrate by authorities to be cited, in connection with another point, value or reasonable value and market value are synonymous. The only evidence before the court from which the value of the water can be determined, is in the testimony of the plaintiff's witnesses, Lillis and Morton. Mr. Lillis testified, from his investigation, that the value of this water at the well was from 15¢ to 20¢ per barrel. (R. 186). Mr. Morton, an oil man of more than thirty years experience in the various aspects of the oil business, testified that the value of the water at the well for drilling purposes, depending upon the distance of the source from the well, was, up to five miles, 25¢ per barrel, with proportionate increases thereafter. (R. 200). The testimony showed that there were other sources of water in the vicinity from one to four miles distant. (R. 186-187). The only user and the only market apparent in the vicinity was the defendant The Texas Company, and we recognized and recognize that there are other sources of water in the area from which the defendant The Texas Company, could have procured its supply of water without cost for the water itself. Upon this basis, it is our theory that the price which The Texas Company should be willing to pay for this water and the price which the plaintiff should be willing to accept, should be measured by the cost of procuring the water from the other sources of supply. It is, therefore, our contention that the marekt value of the water can best be measured by the cost of transporting water from the free source to the defendant's well sites. Consequently, the testimony of Lillis and Morton and of the plaintiff, Russell (R. 205) on this

matter, supplies a competent and accurate measure of the market value of the water wrongfully used by the defendant The Texas Company. See Rider v. Cooney, infra, 94 Mont. 295, 23 Pac. (2d) 261.

Defendant The Texas Company, used 15,000 barrels of water over a period of 57 days, an average of 282 barrels a day. Of these 57 days, 45 were prior to the letter of October 28. That is approximately 12,690 barrels of water used prior to the letter of October 28, and plaintiff's recovery at the lowest figure testified to, should have been $1,903.50 for this water.

The only testimony before the lower court as to the value of the use of the roads for access to defendant The Texas Company's operations on lands other than the lands of the plaintiff, is the testimony of Mr. Lillis, who testified that the use of these roads should be reckoned at at least $2.00 per day. (R. 182) This testimony was not disputed or contradicted. The Texas Company, having commenced its use of these roads for operations on lands other than those of the plaintiff on September 3, 1952, plaintiff's recovery for the use of the roads up to the time of the letter of October 28, should have been $110.00.

Mr. Lillis testified that the scoria used by the defendant The Texas Company was reasonably worth 50¢ per yard in the quarry. (R. 184) The defendant's witness, Mr. Bliss, testified that they had purchased scoria at 5¢ per yard in the quarry and he himself admitted that he considered this an unusually good deal. (R. 220-221) At any rate, for the 50

yards of scoria admittedly used in connection with defend ant's operations upon other lands than those of the plaintiff plaintiff should have been entitled to recover at least th sum of $25.00.

By mathematical computation, plaintiff's recovery in con nection with the use by Defendant The Texas Company, o plaintiff's lands in connection with their operations upo other lands, should have been the sum of $5,378.50. Of this the court allowed only $3,600.00 due under the Revocable License.

(b) *Market Value of the Surface Area in Section 23 Utilized by the Defendant, The Texas Company*

It is, of course, the contention of the plaintiff and appellant, as it has been from the beginning, that the reservation of mineral rights of the Northern Pacific Railway Company, pursuant to which that company purported to lease to the defendant The Texas Company, is void. However, in view of the fact that defendant The Texas Company, admitted an indebtedness to the plaintiff for the reasonable market value of such portions of surfaces of the plaintiff's lands as were used (See separate answer of The Texas Company [R. 35]), and in view of the fact that the testimony reveals particularly the testimony of the witness, Lillis (R. 178), that the productivity of the lands utilized by the defendant, The Texas Company, is completely destroyed, it was proper for the lower court to determine and award to the plaintiff the reasonable market value of the surface utilized by the de-

'endant, The Texas Company. In this connection, it is our :ontention that the lower court adopted an incorrect mea- ure of the value of the surface utilized and destroyed by lefendant, The Texas Company.

It is apparent that the lower court based its determina- ion of the market value of the surface upon the basis of the se of the land for grazing purposes. It is our contention hat such was not the proper basis for valuing the land. In Rider v. Cooney, 94 Mont. 295, 308, 23 Pac. (2d) 261, the upreme Court of Montana, said:

> " 'Value' means the price which property could command in the market. By 'value,' in common parlance, is meant 'market value,' which is no other than the fair value of property as between one desiring to purchase and another desiring to sell; and the words 'value' and 'market value' are often used interchangeably, and both as being the equivalent of 'actual value' and 'salable value.' (James v. Speer, 69 Mont. 100, 220 Pac. 535. See. also, State v. Hoblitt, 87 Mont. 403, 288 Pac. 181; State ex rel Snidow v. State Board of Equalization, 92 Mont. 19, 17 Pac. (2d) 68.)"

Section 93-9913, R.C.M., 1947, relating to eminent domain roceedings, provides in part as follows:

> "* * * and its actual value at that date shall be the measure of compensation of all property to be actually taken, * * * ."

In the case of State v. Hoblitt, 87 Mont. 403, 413, 288 ac. 181, the Montana Supreme Court, speaking of this tatute, said:

"Section 9945, Revised Codes of 1921, provides that 'for the purpose of assessing compensation and damages (in a condemnation proceeding), the right thereto shall be deemed to have accrued at the date of the summons, and its actual value at that date shall be the measure of compensation of all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected.'

The 'actual value' is the market value, 'the price that would in all probability result from fair negotiation, where the seller is willing to sell and the buyer desires to buy.' (Northern Pac. & Mont. Ry. Co. v. Forbis, 15 Mont. 452, 48 Am. St. Rep. 692, 39 Pac. 571; Maxon v. Gates, 136 Wis. 270, 116 N.W. 758, 765.)

"The owner has the right to obtain the market value of the land, *based upon its availability for the most valuable purpose for which it can be used, whether so used or not.* (Montana Ry. Co. v. Warren, 6 Mont. 275, 12 Pac. 641)." (Emphasis supplied).

Defendant, The Texas Company, has by its operations demonstrated that the most valuable use to which this land can be put, is for the purpose of producing oil, and it is this use which we contend must determine the market value of the land used by The Texas Company. (See Plaintiff's Exhibit 10). In other words, it is our contention that this value must be determined as it would be determined between the plainiff and the defendant, The Texas Company, if there were no reservation of the right to go upon the land for the purpose of mining for and removing minerals. It must be determined, as it would be determined if The Texas Company were required to negotiate with the plaintiff, Russell

for the purpose of purchasing so much of the surface as might be necessary for its operations. See Yellowstone Park R. R. Co. v. Bridger Coal Co., 34 Mont. 545, 556, 87 Pac. 963, wherein Mr. Chief Justice Brantley, speaking for the Supreme Court of the State of Montana, said:

> "and, in determining the amount which they are entitled to recover, the court is bound to take into consideration every element of value which would be taken into consideration if the plaintiff were negotiating a sale with the defendants as a willing purchaser and the defendants were willing sellers. (Boom Co. v. Patterson, 98 U.S. 403, 25 L. Ed. 206; Webster v. Kansas City etc. Ry. Co., 116 Mo. 114, 22 S.W. 474; Denver etc. R.R. Co. v. Griffith, supra.)"

In other words, the fact that appellant is in effect forced to sell the surface required by The Texas Company to The Texas Company, should not be considered in a determination of the market value. See also the definition of market value appearing in Black's Law Dictionary, page 1162, as follows:

> "The market value of an article or piece of property is the price which it might be expected to bring if offered for sale in a fair market; *not the price which might be obtained on* a sale at public auction or *a sale forced by the necessities of the owner,* but such a price as would be fixed by negotiation and mutual agreement, after ample time to find a purchaser, as between a vendor who is willing (but not compelled) to sell and a purchaser who desires to buy but is not compelled to take the particular article or piece of property. See Winnipiseogee Lake, etc., Co. v. Gilford, 67 N.H. 514,

35 A. 945; Muser v. Magone, 155 U.S. 240, 15 S. Ct. 77, 39 L. Ed. 135; Esch v. Railroad Co., 72 Wis. 229, 39 N.W. 129; Sharpe v. U.S., 112F. 989, 50 C.C.A. 597, 57 L.R.A. 932; Little Rock Junction Ry. v. Woodruff, 49 Ark. 381, 5 S.W. 792, Am. St. Rep. 51; Lowe v. Omaha, 33 Neb. 587, 50 N.W. 763; San Diego Land Co. v. Neale, 78 Cal. 63, 20 P. 372, 3 L.R.A. 83; Consolidated Gas, Electric Light & Power Co. of Baltimore v. City of Baltimore, 130 Md. 20, 99 A. 968, 972; People ex rel Brown v. Purdy, 186 App. Div. 54, 173 N.Y.S. 782, 784; Tyson Creek R. Co. v. Empire Mill Co., 31 Idaho 580, 174 P. 1004, 1006; Merchants' Cotton Oil Co. v. Acme Gin Co. (Tex. Civ. App.) 284 S.W. 680, 682; William H. Lowe Estate Co. v. Lederer Realty Corporation, 35 R.I. 352, 86 A. 881, 883 Ann. Cas. 1916A, 341; Stanley v. Sumrell (Tex. Civ. App.) 163 S.W. 697, 698; Illinois Power & Light Corporation v. Parks, 322 Ill. 313, 153 N.E. 483, 486." (Emphasis supplied)

See also State et al vs. Bradshaw Land Etc. Co., 99 Mont. 95, 109, 43 Pac. (2d) 674, where it is said:

"'In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the use to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and

make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated. So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future."

The defendants' answers to interrogatories, together with the testimony of the defendant's witness, Traver, reveals that a total of approximately 23.42 acres of the surface of the plaintiff's lands had been used in connection with The Texas Company's operations. (Plaintiff's Exhibit 3) and (R. 210-214). There is no allowance contained in these figures for the reservoir created on the plaintiff's land by the action of The Texas Company. There was some testimony to the effect that this reservoir was of some possible benefit to the plaintiff or to his lessee. We fail to see how this fact could make any possible difference in the liability of The Texas Company to pay to the plaintiff the market value of the property taken for the reservoir. The plaintiff is no more obligated to accept an improvement without compensation than he is obligated to accept a detriment without compensation. According to the testimony of the witness, Lillis, (R. 77) this reservoir occupies approximately two acres of the

plaintiff's lands, which would raise the figure previously stated, to approximately 25.42 acres.

The only testimony before the lower court on the value of the surface for oil well drilling purposes is the testimony of the witness, Morton, who testified, based upon his experience in the field, upon his knowledge of the productivity of this particular area, and with the fact in mind that it is only the surface right involved, that this land, using the figure of 24½ acres, was worth from $10,000 to $20,000. (R. 203) We submit that the lower court was in error in allowing The Texas Company to acquire property of immense value to them by payment of a mere pittance to the plaintiff herein, and we submit that the plaintiff was and clearly is entitled to a substantial recovery for this land.

The defendant, The Texas Company, by its answer of December 11, 1953, to interrogatories submitted by the plaintiff, admitted the use of 34,000 barrels of surface water on plaintiff's Section 23 in connection with its operations on Section 23. For this water the plaintiff was allowed nothing by the lower court. It is our contention that this water is clearly a part of the surface taken by the defendant, The Texas Company, for which it must pay the reasonable market value. At the lowest figure in evidence, to-wit: 15¢ per barrel, the reasonable market value of this water is $5.100.00.

We may be anticipating an argument which will not be presented, but it is our belief that The Texas Company may contend that they were entitled to the use of this water with-

out payment therefor, other than the payment for the amount of the surface used. If such a contention be advanced, it is a contention without merit. In Prentice vs. McKay et al, 38 Mont. 114, 117, 98 Pac. 1081, the Supreme Court of Montana, said:

> "The United States and the State of Montana have recognized the right of an individual to acquire the use of water by appropriation (Rev. Stats. U.S., Secs. 2339, 2340 (U.S. Comp. Stats. 1901, p. 1437); Revised Codes, Secs. 4840 et seq.; Wood v. Etiwanda Water Co., 122 Cal. 152, 54 Pac. 726; Welch v. Garrett, 5 Idaho, 639, 51 Pac. 405; but neither had authorized, nor, indeed, could authorize, one person to go upon the prviate property of another for the purpose of making an appropriation, except by condemnation proceedings. The general government has merely authorized the prospective appropriator to go upon the public domain for the purpose of making his appropriation (see note to Heath v. Williams, 43 Am. Dec. 265, [25 M.E. 209]), and the statutes of this state (sections 4840-4891, above) only apply to appropriations made on the public lands of the United States or of the state, and to such as are made by individuals who have riparian rights either as owners of riparian lands or through grants from such owners."

The reservation of mineral rights upon which the deendant, The Texas Company, depends for its right, is beore this Court, in The Texas Company's answer (R. 7). It eads as follows:

> "excepting and reserving unto the vendor its sucessors and assigns forever all minerals of any nature whatsoever, including coal, iron, natural gas and oil,

upon or in said land, together with the use of such of the surface as may be necessary for exploring for and mining or otherwise extracting and carrying away the same; but the vendor shall pay to the purchaser the market value at the time mining operations are commenced of such portion of the surface as may be used for such operations, including any improvements thereon; the purchaser shall notwithstanding have at all times the right to mine and remove such reasonable quantity of coal as may be necessaray for his own domestic use."

This reservation does not purport to give to the grantor any right to the use of the water upon the plaintiff's land, at least not without the payment therefor of the reasonable market value of such water. It is also the rule that reservations such as this may not be asserted or exercised except for the purpose of searching for and extracting minerals. See 28 C.J.S., Easements, Sec. 92; 58 C.J.S., Mines and Minerals, Sec. 159. We submit that under the reservations The Texas Company is equally obligated to pay the reasonable market value of the water as they were to pay the reasonable market value of the surface of the land itself.

Upon reason and authorities, it is submitted that the plaintiff herein was entitled to recover from The Texas Company, at least the sum of $20,683.50.

CONCLUSION

On the basis of the foregoing arguments and authorities, we submit that the Court below was clearly in error in finding as a matter of law that the mineral reservation of the

Northern Pacific Railway Company, in the deed to plaintiff's predecessor, was and is invalid, and that Specifications of Error Nos. 1 through 7 are well taken.

It is further submitted that the plaintiff herein was entitled to recovery against the defendant, The Texas Company, for the use of his lands and water and materials from his lands in connection with The Texas Company's operations upon other lands during the period of time prior to the offer of a Revocable License, and that Specifications of Error Nos. 10, 13, 14, 15, 17 and 21 are well taken.

It is further submitted that the lower court clearly erred in allowing to the plaintiff only the sum of $10.00 per acre for the surface of plaintiff's lands utilized by defendant, The Texas Company, and that Specifications of Error Nos. 8, 9, 11, 13, 15, 17 and 20 are well taken.

It is submitted that this cause must be reversed and remanded for such further proceedings as may be necessary to fully adjudicate and determine plaintiff's claims, based upon the first cause of action and to enter proper judgment upon the second and third causes of action in plaintiff's Complaint.

Respectfully submitted,

RALPH J. ANDERSON,
STANLEY P. SORENSON,
Attorneys for Appellant,
Theodore B. Russell
517 POWER BLOCK
P. O. BOX 252
HELENA, MONTANA

APPENDIX

CHAP. CCXVII—An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from Lake Superior to Puget's Sound, on the Pacific Coast, by the Northern Route.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, * * *

"SEC. 2. And be it further enacted, That the right of way through the public lands be, and the same is hereby, granted to said 'Northern Pacific Railroad Company', its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands, adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction therof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables, and water-stations; and the right of way shall be exempt from taxation within the territories of the United States. The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the (road) named in this bill.

"SEC. 3. And be it further enacted, That there be, and hereby is, granted to the 'Northern Pacific Railroad Company', its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores,

over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat therof filed in the office of the commissioner of the general land-office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu therof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections; * * *

"SEC. 4. And be it further enacted, That whenever said Northern Pacific Railroad Company' shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to, and coterminous with, said completed section of said road; and, from time to time, whenever twenty-five additional consecutive miles shall have been

constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid: Provided, That not more than ten sections of land per mile, as said road shall be completed, shall be conveyed to said company for all that part of said railroad lying east of the western boundary of the State of Minnesota, until the whole of said railroad shall be finished and in good running order, as a first-class railroad, from the place of beginning on Lake Superior to the western boundary of Minnesota: Provided, also, That lands shall not be granted under the provisions of this act on account of any railroad, or part thereof, constructed at the date of the passage of this act.

"SEC. 5. And be it further enacted, That said Northern Pacific Railroad shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations, and watering places, and all other appurtenances, including furniture, and rolling stock, equal in all respects to railroads of the first class, when prepared for business, with rails of the best quality, manufactured from American iron. And a uniform gauge shall be established throughout the entire length of the road. And there shall be constructed a telegraph line, of the most substantial and approved description, to be operated along the entire line: * * *

"SEC. 6. And be it further enacted, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or preemption before or after they are sur-

veyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting preemption rights, and the acts amendatory thereof, and of the act entitled 'An Act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale.

"* * *

SEC. 8. And be it further enacted, That each and every grant, right, and privilege herein are so made and given to, and accepted by, said Northern Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the whole road by the fourth day of July, anno Domini eighteen hundred and seventy-six.

"SEC. 9. And be it further enacted, That the United States make the several conditioned grants herein, and that the said Northern Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one eyear, then, in such case, at any time thereafter, the United States, by its congress, may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road.

"SEC. 10. And be it further enacted, That all people of the United States shall have the right to subscribe to the

stock of the Northern Pacific Railroad Company until the whole capital named in this act of incorporation is taken up, by complying with the terms of subscription; and no mortgage or construction bonds shall ever be issued by said company on said road, or mortgage, or lien made in any way, except by the consent of the congress of the United States.

"* * *

"SEC. 20. And be it further enacted, That the better to accomplish the object of this act, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend, or repeal this Act."

"(No. 67) A Resolution authorizing the Northern Pacific Railroad Company to issue its Bonds for the Construction of its Road and to secure the same by Mortgage, and for other Purposes.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Northern Pacific Railroad Company be, and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation; and, as proof and notice of its legal execution and effectual delivery, said mortgage shall be filed and recorded in the officee of the Secretary of the Interior; and also to locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound,

via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; and in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four. And that twenty-five miles of said main line between its western terminus and the city of Portland, in the State of Oregon, shall be completed by the first day of January, anno Domini eighteen hundred and seventy-two, and forty miles of the remaining portion thereof each year hereafter, until the whole shall be completed between said points: Provided, that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and preemption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre; and if the mortgage or other legal proceeding, or the mortgaged lands hereby granted, or any of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity or for any failure or de-

fault of said company under the terms thereof, such land shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder: Provided further, That in the construction of said railroad, American iron or steel only shall be used, the same to be manufactured from American ores exclusively.

"Sec. 2. And be it further resolved, That Congress may at any time alter or amend this joint resolution, having due regard to the rights of said company, and any other parties.